AMERICANS UNITED
for Separation of Church and State

Maggie Garrett
Legislative Director

(202) 466-3234 x226
(202) 898-0955 (fax)
garrett@au.org

1301 K Street, NW
Suite 850, East Tower
Washington, DC 20005

February 12, 2013

**Re: Oppose HR 592, the Federal Disaster Assistance Nonprofit Fairness Act of 2013**

Dear Representative:

Americans United writes to express our strong opposition to HR 592, the Federal Disaster Assistance Nonprofit Fairness Act of 2013, which will be debated on the House floor tomorrow, Wednesday, February 13. The sole purpose of the bill is to authorize the Federal Emergency Management Agency (FEMA) to issue direct grants to fund the rebuilding of houses of worship. We oppose this bill because such funding would violate the Constitution and represent a significant shift in longstanding federal policy. Indeed, the George W. Bush Administration followed the policies of the Reagan, George H.W. Bush, and Clinton Administrations when it disallowed FEMA grants for the rebuilding of "houses of worship" after Hurricane Katrina.[1]

As someone who was born and raised at the Jersey shore and whose parents are still making repairs to their home and cleaning up after the storm, I certainly appreciate the needs the community faces. But, I also recognize that the Constitution places certain limits on the government's ability to fund houses of worship. The *Tilton/Nyquist* [2] line of Supreme Court cases firmly establish that it is constitutionally impermissible for the government to provide aid for the construction and repair of houses of worship. In accordance with these cases, "the State may not erect buildings in which religious activities are to take place" and "it may not maintain such buildings or renovate them when they fall into disrepair."[3]

The rule set down by the Supreme Court in these cases remains controlling law as neither they, nor the principal behind them, have ever been overruled in any subsequent Supreme Court decision.[4] To the contrary, in its more recent cases examining the constitutionality of government aid to religious institutions, the Supreme Court has maintained that direct money grants create "special Establishment Clause dangers."[5] Congress too just recently recognized the applicability of this precedent when it limited green construction funding in the Recovery Act to buildings in which secular activities take place.

---

[1] Alan Cooperman, "Parochial Schools to Get U.S. Funds for Rebuilding," Wash. Post, Oct. 19, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/10/18/AR2005101801622.html.

[2] *Tilton v. Richardson*, 403 U.S. 672 (1971) (holding unanimously that a government subsidy used to construct buildings at colleges and universities was constitutional only if the buildings could never be used for religious activities); *Hunt v. McNair*, 413 U.S. 734 (1973) (upholding issuance of revenue bonds to finance the construction and renovation of facilities because the law included a condition barring government-financed buildings from being used for religious worship or instruction); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973).

[3] *Nyquist*, 413 U.S. at 777.

[4] Recent federal court decisions, including *Community House v. Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007), 567 F.3d 278 (6th Cir. 2009), apply *Tilton*'s holding that "to avoid an Establishment Clause violation, a publicly financed government building may not be diverted to religious use." The only case that diverts from this longstanding precedent is one from the Sixth Circuit, *American Atheists v. City of Detroit Downtown Dev. Auth*. Yet, even this case does not stand for the proposition that federal grants can fund the reconstruction of houses of worship. Instead, the case distinguishes *Tilton* and *Nyquist*, arguing that the grant program before the Sixth Circuit was a "one-time grant limited to exterior cosmetic repairs" and "one-time surface-level improvements" that served a particular purpose and was very limited in scope. *Id*. at 298-99.

[5] *Mitchell v. Helms*, 530 U.S. 793, 819 (1999) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995)) (Thomas, J.); *see also id.* at 856 (O'Connor, J., controlling and concurring opinion) (describing *Tilton* as striking down the grant statute because it lacked a "secular content requirement").

Furthermore, proponents' claims that *Tilton* and *Nyquist* are inapplicable and that Congress should instead look to free speech forum and in-kind aid cases must be rejected. The Supreme Court has squarely held that free speech forum cases are inapposite to federal aid cases[6] and that money grants are distinct from in-kind funds. [7]

It is also important to note that houses of worship, like most non-profit organizations and businesses, are eligible for government loans—just not direct grants—to rebuild. In addition, houses of worship are not the only nonprofits that are ineligible for direct grants for reconstruction. To the contrary, *only* nonprofits with facilities that are used for emergency, essential, and government-like activities are eligible.[8] And, eligible facilities, such as community centers, must also be open to the general public.[9] To say that houses of worship are singled out among all other non-profits, therefore, is untrue. It is similarly inaccurate to claim that FEMA grants should be extended to houses of worship because the grants are akin to "general government services," such as police or fire. FEMA grants—unlike general government services —are not available to every business, nonprofit, private residence, or other building.

Although it may not seem easy in times of tragedy to tell those seeking aid that they are ineligible for government grants, the bar on the government rebuilding of houses of worship is an important limitation that exists to protect religious freedom for all. It upholds the fundamental principle that no taxpayer should be forced to fund a religion with whom he or she disagrees and that the government should never support building ("establishing" religion in its most basic form) religious sanctuaries. And, it protects against the government favoring, or creating the perception of favoritism for, certain religions over others.

Houses of worship are special in our country and our constitution. They are both the place where worship takes place, and, adorned with religious symbols and iconography, are themselves expressions of worship. Accordingly, they are accorded special protections—exemptions, accommodations, and tax deductions. Restrictions on government funding of religion is also a special protection—they protect the conscience of the individual taxpayer, safeguard the autonomy of the religious institution, and ensure an equal playing field for all religions by prohibiting the government from playing favorites.

For the reasons listed above, we urge you to oppose HR 592.

Sincerely,

Maggie Garrett
Legislative Director

---

[6] In *Locke v. Davey,* 540 U.S. 712, 720 n.3 (2004), the Supreme Court explained that the free speech line of case law does not apply to federal aid cases: "Davey, relying on *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, contends that the Promise Scholarship Program is an unconstitutional viewpoint restriction on speech. But the Promise Scholarship Program is not a forum for speech. . . . Our cases dealing with speech forums are simply inapplicable."

[7] *Mitchell v. Helms*, 530 U.S. at 819 (explaining that direct grants of money create "special Establishment Clause dangers").

[8] Eligible facilities are limited to "educational, utility, irrigation, emergency, medical, rehabilitational, and temporary or permanent custodial" facilities and "any private nonprofit facility that provides essential services of a governmental nature to the general public (including museums, zoos, performing arts facilities, community arts centers, libraries, homeless shelters, senior citizen centers, rehabilitation facilities, shelter workshops, and facilities that provide health and safety services of a governmental nature)." 42 U.S.C. § 5122(10).

[9] Disaster Assistance Policy 9521.1 – Community Center Eligibility, http://www.fema.gov/9500-series-policy-publications/95211-community-center-eligibility: "Facilities established or primarily used for political, athletic, religious, recreational, vocational or academic training, conferences, or similar activities are not eligible PNP community centers."